

No. 75-1883

In the Supreme Court of the United States

OCTOBER TERM, 1975

FILED

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MICHAEL RODAK, JR., CLERK

UNITED STATES OF AMERICA, PETITIONER

v.

ESTELLE JACOBS, A/K/A "MRS. KRAMER"

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

ROBERT H. BORK,
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**PETITION FOR A WRIT OF CERTIORARI TO THE
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FOR THE SECOND CIRCUIT**

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-9a) is reported at 531 F.2d 87. The opinion of the district court (App. D, *infra*, pp. 14a-21a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 10a-11a) was entered on February 24,

1976. A petition for rehearing with a suggestion for rehearing *en banc* was denied on April 29, 1976 (App. C, *infra*, pp. 12a-13a). On May 24, 1976, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including June 28, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a court of appeals possesses and should exercise supervisory powers to suppress a defendant's allegedly perjurious grand jury testimony on the ground that the prosecutor neglected to follow the usual practice of other federal prosecutors in the circuit of warning grand jury witnesses against whom the government has incriminating evidence that they are "putative defendants."

STATEMENT

Respondent made dunning telephone calls as an employee of a debt collection agency. In the course of attempting to locate the whereabouts of a delinquent gambling debtor she made numerous calls to various members of his family.¹ Without her knowledge the debtor's brother tape-recorded a call during

¹ See page D-27 of the Appendix to the government's brief in the court of appeals. Appendices D and E of that document consist of the Grand Jury Minutes of respondent's testimony. Further reference to that testimony will be designated "Grand Jury Minutes —." We are lodging a copy of the Appendix with the Clerk of this Court.

which she allegedly threatened the debtor with physical harm if he did not pay up (App. A, *infra*, p. 3a). Some four months later, agents of the Federal Bureau of Investigation, after giving respondent full *Miranda* warnings and observing her sign a waiver of rights form, questioned her about the call. They did not tell her that it had been recorded, and she denied making any threats (App. A, *infra*, p. 3a).

Subsequently the government subpoenaed respondent to appear before a grand jury sitting in the Eastern District of New York and there questioned her about her employer's business in general and the role she played in it. Again she was not told about the recording (App. A, *infra*, pp. 3a-4a). She denied unequivocally having made certain statements that were read to her by the government attorney from a transcript of the recorded conversation,² and the

² Respondent often identified herself over the telephone as "Mrs. Kramer" (Grand Jury Minutes D-2). The pertinent testimony was as follows (*id.* at D-39 to D-41):

Q I'm going to read some direct quotes to you, Mrs. Jacobs, and I want to know whether or not you said them?

"MRS. KRAMER: Well, you know what's going to happen to him one of these days.

BILL: Well, he's going to die ["he" refers to the debtor, who by then was known to be suffering from leukemia] and now that's besides the point.

MRS. KRAMER: Sooner than he expects.

BILL: No, I don't.

MRS. KRAMER: Sooner than he expects. Maybe it's going to be painful to be honest with you."

grand jury indicted her for perjury³ (App. A, *infra*, p. 4a).

Prior to her grand jury testimony the government had advised respondent of her Fifth Amendment

A I never said that.

Q Are you absolutely positive that you never said that?

A Absolutely positive.

Q Now, you're under oath—

A I never said that.

Q You never said to anyone these words, "Maybe it's going to be painful, to be honest with you."

A I never said it. I know I'm under oath.

Q Now, did you know the statute of perjury?

A Yes. I never said that.

Q We'll continue.

"BILL: Well, you know it's got nothing to do with me.

MRS. KRAMER: I mean it's really a shame, but he's gonna get his pretty soon, just a matter of hours to be honest with you and as I told you, I'm being honest with you. We didn't like going to the mother, but we will.

BILL: Well, you know."

Q (continuing) Do you recognize those words?

A Not exactly.

Q You had some sort of conversation?

A By the way of saying I wish you could contact your brother.

Q Did you say, "What he's going to get his pretty soon"?

A I did not.

Q You absolutely deny that statement?

A Yes. I deny it.

³ Respondent was also indicted for transmitting in interstate commerce a threat to injure, in violation of 18 U.S.C. 875(c). That count is not involved here.

privilege against self-incrimination and told her that she had a right to have a lawyer outside the grand jury room and to consult with him at any time (Grand Jury Minutes D-3 to D-4; App. D, *infra*, pp. 15a-17a, n. 2). She had not been given the full litany of *Miranda* warnings to which individuals facing custodial interrogation are entitled,⁴ nor had she been told that she was a "putative defendant." She had been advised, however, that perjury was a serious offense (*ibid.*), and before testifying she had sworn that her testimony would be truthful (Grand Jury Minutes D-2).

Before trial, respondent moved to suppress her grand jury testimony on the ground that the government's warnings to her had been inadequate. The district court granted the motion, relying on *United States v. Mandujano*, 496 F.2d 1050 (C.A. 5), reversed, No. 74-754, May 19, 1976, and *United States v. Washington*, 328 A.2d 98 (D.C. C.A.), certiorari granted, No. 74-1106, June 1, 1976. The court ruled that the government's questioning of respondent, without first giving her full *Miranda* warnings and advising her that she was a "putative defendant,"

⁴ The government had not told respondent either that she had a right to remain silent before the grand jury or that counsel would be provided for her if she were unable to bear the expense herself. Respondent was unrepresented at the time of her testimony; she stated that she was not in need of counsel (Grand Jury Minutes D-4; App. D, *infra*, pp. 15a-17a, n. 2), and she was advised that she could stop the grand jury proceedings to consult with counsel whenever she wanted (*ibid.*).

was “‘so offensive to the common and fundamental ideas of fairness as to amount to a denial of due process’” (App. D, *infra*, p. 20a). Without her testimony the government was unable to prosecute the perjury charge, and the district court accordingly dismissed it (*id.* at 20a-21a).

The court of appeals affirmed, although for different reasons. It expressly declined to reach the Fifth Amendment self-incrimination and due process issues that had been argued both in the district court and on appeal (App. A, *infra*, pp. 8a-9a), and ruled instead, “solely under [its] supervisory power” (*id.* at 9a), that suppression was necessary because of the lack of “uniformity in criminal procedure within the circuit” (*ibid.*) that had been created by the government’s failure to apprise respondent that she was a “putative defendant.”

Upon learning that the government attorney who had questioned respondent before the grand jury—a “Strike Force” attorney⁵—had not told her that she was a “target” of the investigation, the court had directed the clerk of the court to poll the six United States Attorneys in the Second Circuit to learn their practice in this regard. Each replied that they customarily warn grand jury witnesses who are “putative defendants” of their status. This survey indicated to the court that respondent would have been warned that she was a “putative defendant” if she

⁵ As the court of appeals explained (App. A, *infra*, pp. 3a-4a, n. 2), Strike Force attorneys operate under a commission from the Attorney General issued pursuant to 28 U.S.C. 515(a).

had been subpoenaed by the United States Attorney, yet "the Strike Force operating in the same district failed to give her such warning" (App. A, *infra*, pp. 7a-8a). The lack of uniformity was, in court's view, intolerable. It said (*id.* 8a-9a):

In this posture of conflicting conceptions of prosecutorial fairness in the same district, we need not consider whether there is a constitutional due process claim as the court below held. Uniform justice is not achieved in the face of such disparity which, if not in actual violation of the Constitution, is, at least, outside the penumbra of fair play. * * *

In the interest of uniformity in criminal procedure within the circuit, which is a fundamental of the administration of criminal justice, we affirm the dismissal of [the perjury count] pursuant to our supervisory function.

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the nature and scope of the federal courts' supervisory function. In our view the court of appeals in this case has exercised powers that Congress in effect has declared it does not possess. In so doing it has rendered a decision that produces a result forbidden by Congress and that conflicts with the decision of another court of appeals.

Even absent controlling legislation, however, the court's exercise of its supervisory powers would have been error, since the prosecutorial uniformity that the court found lacking is not mandated by the Con-

stitution or by statute and did not violate any of respondent's rights. Moreover, in requiring the suppression of allegedly perjurious testimony the decision below conflicts with the spirit if not the letter of *United States v. Mandujano*, No. 74-754, decided May 19, 1976.

1. The action of the court of appeals in the instant case violates a fundamental tenet delimiting the reach of the courts' supervisory power—that the power of the judiciary to formulate and apply rules of evidence is subordinate to the paramount authority of Congress, subject to constitutional limitations, to declare what practices and procedures will govern in the federal court system. *E.g.*, *Gordon v. United States*, 344 U.S. 414, 418; *Funk v. United States*, 290 U.S. 371, 382, 383. The principle was stated expressly in *Palermo v. United States*, 360 U.S. 343, 353, n. 11: "The power of this Court to prescribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress." See also *McNabb v. United States*, 318 U.S. 332, 341, n. 6; *United States v. Wright*, 489 F.2d 1181, 1190-1191 (C.A.D.C.).

At least two Acts of Congress stand in the way of the court of appeals' exercise of its supervisory power⁶ to suppress respondent's testimony in this case:

⁶ The supervisory powers possessed by the lower federal courts can surely be no broader than the rulemaking authority of this Court, and no less subject to congressional limitation.

a. Section 3501(a) of Title 18 provides that in any criminal prosecution a confession, which is defined to include “any self-incriminating statement” (Section 3501(e)), “*shall* be admissible in evidence if it is voluntarily given” (emphasis added). Absent a finding that respondent’s grand jury testimony was not voluntarily given, the court of appeals had no power—supervisory or otherwise—to suppress it.

b. Rule 402 of the Federal Rules of Evidence even more broadly restricts the supervisory power to exclude relevant evidence.⁷ That rule provides:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

The legislative history of this provision shows that Congress chose its language with care: relevant evidence is to be excluded solely in those cases where exclusion is required “by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court *pursuant to statutory authority*” (emphasis supplied).⁸ See H.R. Rep. No. 93-650, 93d Cong., 1st Sess. (1973). Given the strict limits imposed on this Court’s ability to fashion rules excluding otherwise

⁷ The Federal Rules of Evidence are an Act of Congress. Pub. L. 93-595, 88 Stat. 1926.

⁸ For example, under 18 U.S.C. 3771-3772, empowering this Court to promulgate the Federal Rules of Criminal Procedure.

relevant evidence, Congress plainly could not have intended to allow the courts of appeals an unfettered supervisory power to achieve the same result.

In short, Section 3501(a) and Rule 402 strictly limit the circumstances under which relevant, voluntary statements made by a defendant (or anyone else) may be suppressed, leaving no room whatever for the exercise of inconsistent supervisory powers by the federal courts. In suppressing respondent's grand jury testimony without first finding a violation of the Constitution, an Act of Congress, or a rule formulated by this Court in the exercise of its rulemaking authority, the court of appeals has acted pursuant to supervisory powers that it does not possess. The propriety of that action merits review by this Court.

2. Moreover, by invoking the court's supervisory powers and ignoring the directive contained in 18 U.S.C. 3501(a), the decision below conflicts with *United States v. Crook*, 502 F.2d 1378 (C.A. 3), certiorari denied, 419 U.S. 1123. There the court held that a defendant's voluntary waiver of counsel prior to questioning by federal agents who knew he was represented by counsel on pending, unrelated charges did not contravene *Massiah v. United States*, 377 U.S. 201. The court then considered and rejected the possible exercise of its supervisory powers to create a rule that would adopt the prohibition against interrogating a defendant in the absence of his counsel contained in the American Bar Association's Code of Professional Responsibility (DR 7-104

(A) (1) (Final Draft, 1969)). The court noted (502 F.2d at 1380) that the Code provisions were enforceable "only under our supervisory powers," which are "subject to the control of Congress." Since Congress had decreed that voluntary confessions shall be admitted, the court recognized its lack of authority to formulate an inconsistent evidentiary rule. "We cannot," said the court (*id.* at 1381), "in exercising merely supervisory powers, disregard the congressional mandate of 18 U.S.C. § 3501(a)."⁹

3. Even had Congress not spoken on the evidentiary issue, grave questions would attend the court of appeals' exercise of its supervisory powers in this case to immunize a defendant from liability for acts made criminal by statute. The court expressly declined to consider whether the government's failure to warn respondent that she was a "putative defendant" violated her constitutional rights (App. A, *infra*, p. 8a). Nor did it consider whether any other of respondent's rights, statutory or court-announced, were violated. Rather, the court ruled that the simple lack of uniformity in prosecutorial practice re-

⁹ Perhaps because the present case was decided by the court of appeals on grounds not briefed or argued by the parties, the opinion does not attempt to reconcile the action of the court with the commands of Section 3501 and of Rule 402. Nor does it acknowledge or distinguish the Third Circuit's decision in *Crook*. These authorities were specifically called to the attention of the court in the government's petition for rehearing, which was denied without comment (App. C, *infra*, pp. 12a-13a).

vealed by the Special Attorney's failure to warn respondent of her status required dismissal of the indictment. "[S]uch disparity," said the court, is "outside the penumbra of fair play" (*ibid.*).

But nonuniformity in prosecutorial practice—provided it offends no statutory or constitutional proscription—has never, to our knowledge, been held a sufficient cause to terminate a criminal prosecution. The Executive Branch has broad discretion to carry out its constitutional mandate to "take Care that the Laws be faithfully executed" (United States Constitution, Art. II, Sec. 3). See *United States v. Nixon*, 418 U.S. 683, 693; *United States v. Cox*, 342 F.2d 167, 171 (C.A. 5), certiorari denied *sub nom. Cox v. Hauberg*, 381 U.S. 935. Even a disparity as great as that resulting from the selective enforcement of the criminal laws has been held to fall within this discretion, so long as the prosecutor's decisionmaking is not based upon impermissible standards "such as race, religion, or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456; see also *Washington v. United States*, 401 F.2d 915, 924-925 (C.A. D.C.). Put simply and in contrast to the court of appeals' view, uniformity in prosecutorial procedure is *not* generally "a fundamental of the administration of criminal justice" (App. A, *infra*, p. 9a), especially when its absence results in no prejudice to the rights of the defendant.

It makes no difference that the nonuniformity here was caused by the Strike Force attorney's fail-

ure to follow a general policy already in existence.¹⁰ The nonobservance of a discernible governmental standard that is intended to govern prosecutorial decisionmaking at any of the numerous stages of the criminal process where discretion must be exercised does not warrant dismissal of a prosecution if none of the defendant's rights have been violated. See *Sullivan v. United States*, 348 U.S. 170, 173-174; *United States v. Leonard*, 524 F.2d 1076, 1088-1089 (C.A. 2).¹¹

There is no suggestion in this case that the prosecutor's decision not to warn respondent that she was a "putative defendant" resulted from a discriminatory or other impermissible motive. The court of appeals did not find that any of respondent's rights had been abridged by her failure to receive such a warning, and an abstract interest in uniformity of criminal procedure is an insufficient justification for the court's exercise of supervisory powers in a manner necessitating dismissal of the indictment against re-

¹⁰ Although each of the United States Attorneys in the Second Circuit appears to follow a practice of warning "putative defendants" of their status, and although in most cases most United States Attorneys apparently give such warnings, no governing Department of Justice policy exists and apparently the practice varies even within some United States Attorneys' offices.

¹¹ The contrary result reached by the decision below is not, however, without support. See *United States v. Leahey*, 434 F.2d 7 (C.A. 1); *United States v. Heffner*, 420 F.2d 809 (C.A. 4); *United States v. Sourapas*, 515 F.2d 295 (C.A. 9).

spondent. The decision below excuses a violation of the criminal law because of the court's displeasure with certain governmental conduct, and in so doing ignores this Court's twice-repeated caution, given in the context of entrapment cases but no less applicable here, that the federal judiciary does not sit to exercise "a 'chancellor's foot' veto over law enforcement practices of which it d[oes] not approve" (*Hampton v. United States*, No. 74-5822, decided April 27, 1976 (plurality op. 6), quoting from *United States v. Russell*, 411 U.S. 423, 435).¹²

4. Suppression of respondent's testimony and dismissal of the indictment is especially inappropriate in this case because it involves a prosecution for perjury.¹³ In *United States v. Mandujano*, No. 74-

¹² There is no obvious answer to the question whether, as a matter of policy, "putative defendants" should be warned that they are targets of the grand jury's inquiry. To some extent considerations of fairness do support such a course, even though such warnings might discourage full and frank cooperation by the witness with the grand jury's inquiry. But the imposition of judicial sanctions for departures from any such policy seems to us a most unsatisfactory way to treat the matter. In comparison with the effect of the Fourth Amendment exclusionary rule, decisions such as that rendered below actually deter governmental adoption of desirable but not constitutionally mandatory policies. Such a result is especially likely here, given the difficulty in determining whether a particular grand jury witness is in fact a "putative defendant." (The problems inherent in administering rules based upon the "putative defendant" concept are discussed at some length in our brief in *United States v. Mandujano*, *supra* (pp. 44-47), and will not be further detailed here.)

¹³ Thus the present case is distinguished from *United States v. Washington*, No. 74-1106, certiorari granted, June 1, 1976,

754, decided May 19, 1976, this Court held that the constitutional privilege against compulsory self-incrimination confers no protection for the commission of such an offense. In that case the court of appeals, relying on both the due process and self-incrimination clauses of the Fifth Amendment, had affirmed the suppression of the defendant's allegedly perjurious grand jury testimony on the ground that, although he had been a "putative defendant" at the time of his testimony, the government had neglected to give him full *Miranda* warnings. Without deciding what, if any, warnings are required to be given "putative defendants" in general (plurality op. 17, n. 7), this Court reversed; all eight Justices who voted in the case agreed that the government's conduct did not deny the defendant due process and that the absence of warnings was immaterial in a perjury prosecution because "[o]ur legal system provides methods for challenging the Government's right to ask questions—lying is not one of them" (plurality

where the court of appeals affirmed suppression of the defendant's grand jury testimony relating to prosecution for the theft that was the subject of the grand jury investigation. Accordingly, even were this Court to reverse in *Washington*, the decision here would not necessarily be disturbed.

This case is also different from *Washington* because here the court of appeals affirmed the dismissal of the indictment against respondent "[i]n the interest of uniformity in criminal procedure within the circuit" (App. A, *infra*, p. 9a), whereas in *Washington* the court ruled that "putative defendant" warnings are required by the self-incrimination clause of the Fifth Amendment. For this reason also the disposition of *Washington* will not necessarily govern this case.

op. 12; concurring op. of Mr. Justice Brennan, p. 1; concurring op. of Mr. Justice Stewart; quoting from *Bryson v. United States*, 396 U.S. 64, 72).

In direct conflict with the principles underlying *Mandujano*, the court of appeals in the present case has ignored the irrelevancy of warnings to subsequent perjury prosecutions. Since the complete absence of "putative defendant" warnings would not defeat a perjury prosecution even if it had violated the defendant's constitutional rights, a different result can hardly be justified simply because the neglect of the warnings in a particular case contrasts with the normal policy of the prosecutor's office.¹⁴

5. Prosecutorial uniformity was not an issue in *Mandujano* and therefore that case does not, strictly speaking, control this one. But the perjury issue decided in *Mandujano* is so closely related to the issues presented here that it would be appropriate, we submit, for this Court to vacate the judgment below and remand for reconsideration in light of that decision. In this manner the court below would have the opportunity to correct its decision if in fact it rested on a misconception of the governing principles in perjury cases, or to clarify its opinion if indeed it deemed the lack of prosecutorial uniformity so seri-

¹⁴ We note also that even if the court of appeals' concern for the lack of uniformity in prosecutorial practice were well founded, the adoption of an exclusionary rule to suppress the testimony here and to compel future uniformity would nonetheless be unwarranted for the reasons stated in our brief in *Mandujano* (pp. 56-57).

ous a governmental transgression as to warrant suppression notwithstanding that this is a perjury case. This Court might thereby avoid unnecessarily passing on important and potentially difficult issues regarding the source and scope of the federal courts' supervisory powers; furthermore, the Court's consideration of such issues, should they still arise after remand, stands to be facilitated by the lower court's elucidation of the principles it deems controlling.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
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RICHARD L. THORNBURGH,
Assistant Attorney General.

WILLIAM F. SHEEHAN, III,
Assistant to the Solicitor General.

JUNE 1976.

1a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 443—SEPTEMBER TERM, 1975

(Argued November 13, 1975
Decided February 24, 1976)

Docket No. 75-1319

UNITED STATES OF AMERICA, APPELLANT

—*against*—

ESTELLE JACOBS, a/k/a "Mrs. Kramer,"
DEFENDANT-APPELLEE

Before:

FEINBERG, GURFEIN and VAN GRAAFEILAND,
Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York, Edward R. Neaher, *Judge*, which granted defendant-appellee's motion to suppress her Grand Jury testimony and to dismiss Count Two of the indictment against her.

Affirmed.

EDWARD C. WEINER, Special Attorney, United States Department of Justice (David G. Trager, United States Attorney, Eastern District of New York), *for Appellant*.

IRVING P. SEIDMAN, New York, N.Y. (Rubin, Seidman & Dochter, New York, N.Y., of counsel), *for Defendant-Appellee*.

GURFEIN, *Circuit Judge*:

The United States appeals from an order of the United States District Court for the Eastern District of New York (Hon. Edward R. Neaher, *Judge*), granting a motion to suppress the Grand Jury testimony of defendant-appellee Estelle Jacobs and dismissing Count Two of the indictment against her.¹ The defendant had moved for an evidentiary hearing and an order to dismiss the indictment on the ground, *inter alia*, that she was a subject of the investigation but had not been informed that she was a subject when she was subpoenaed to testify before the Grand Jury. Judge Neaher granted the motion to dismiss Count Two of the indictment which charged the making of false statements before the Grand Jury in violation of 18 U.S.C. § 1623, but denied the motion to dismiss Count One. The gov-

¹ The indictment, filed on November 11, 1974, contains two counts: Count One charged a violation of 18 U.S.C. § 875(e) —transmitting in interstate commerce a threat to kidnap or injure another. Count Two was the perjury count which was dismissed and which is the subject of this appeal.

ernment appeals the dismissal of Count Two pursuant to 18 U.S.C. § 3731.

The facts are not in dispute with regard to the procedure followed. The defendant is a housewife who was employed at various times in a collection agency. During March 1973 Harry W. Stonesifer, Jr. ("Harry"), using the name of his brother, William D. Stonesifer ("William"), incurred a gambling debt of \$5,060 on a junket to Puerto Rico. During May 1973 defendant serviced this collection account for her employer. She made several telephone calls in that connection, and on May 22, 1973 she allegedly made a telephone call to William, recorded on tape by him, which contained a threat to injure the person of Harry. William notified the Federal Bureau of Investigation ("FBI"). On September 13, 1973 the defendant was interviewed by the FBI who advised her of her *Miranda* rights including the right to remain silent and the right to appointed counsel. She signed an "Advice of Rights" form. The agents questioned her about the Stonesifer account and the fact that she had used the name "Mrs. Kramer" in making telephone calls on the Stonesifer account. She denied that she had harassed William on the telephone. She was not told that her conversation had been recorded.

On June 10, 1974, about nine months later, she was called before the Grand Jury by a subpoena issued by the Organized Crime Strike Force.² She ap-

² The Strike Force attorneys operate under a commission from the Attorney General pursuant to 28 U.S.C. § 515(a)

peared without counsel at that first session; she was warned by the Strike Force Attorney that under the Fifth Amendment she could "refuse to answer any question that you feel might tend to incriminate you." She was also told that under the Sixth Amendment she had a right to counsel of her choice who could be outside the Grand Jury room to assist her "about the procedures on any specific questions." Asked whether she felt the need of an attorney, she responded, "I do not." She was also informed that perjury is a "very serious offense." Appellee was asked to affirm or deny her conversations with William which had been recorded, though the fact of recording was not disclosed to her. Her denials were the basis for Count Two of the indictment.

The Strike Force attorney at her first appearance before the Grand Jury had in his possession the recording of her conversation with William, and, as Judge Neaher found, "[t]he government admits that when she was called to testify before the grand jury the defendant was not just another witness, but was in fact a 'putative defendant,' in that the government had incriminating evidence against her." Nevertheless, she was not warned at the time of her first appearance that she was a subject of the investigation or that she had an absolute right to remain silent.

and under guidelines promulgated by the Attorney General. See Office of the Attorney General, Order No. 431-70, Establishing Guidelines Governing Interrelationships Between Strike Forces and United States Attorneys' Offices, reprinted in *In re Persico*, 522 F.2d 41, 68 (2 Cir. 1975) (appendix).

The District Court concluded that, under the circumstances, the defendant was entitled to "full" *Miranda* warnings including the advice that she had an absolute right to remain silent. It noted that "simply with the possession of the wiretap tape, the government undoubtedly felt it had all but the identity evidence for probable cause to be found by the grand jury that Jacobs violated 18 U.S.C. § 875(c)." He also noted that the Grand Jury had been presented with "sufficient independent identity evidence." The court ruled, accordingly, that "[u]nder the circumstances, asking her if she made the statements the government already had recorded, without fair warning of the trap she was being led into is not permissible prosecutorial conduct," since "the questions which led to the alleged perjurious responses served *no other function* than to give the government an additional prop on which to base its case against defendant" (emphasis in original).

Judge Neaher relied on *United States v. Mandujano*, 496 F.2d 1050 (5 Cir. 1974), *cert. granted*, 420 U.S. 989 (1975). He concluded, as had the Fifth Circuit, that the prosecutorial conduct involved was "so 'offensive to the common and fundamental ideas of fairness' as to amount to a denial of due process." 496 F.2d at 1059.³ His decision to dismiss the false

³ In *Mandujano*, as here, a Special Attorney was involved. As the court noted, "[s]omewhere within this chain of command and information" between him and the United States Attorney a decision was made to subpoena Mandujano as a witness. 496 F.2d at 1058 n.8.

statement count was predicated on the "due process" clause of the Fifth Amendment rather than on its "self-incrimination" provision.

We do not reach either the claimed "self-incrimination" violation or the claimed "due process" violation under the Fifth Amendment. We have held that a prospective defendant may be questioned before a Grand Jury about statements he made in a recording in the possession of the government, without being told of the existence of the recording. *United States v. Del Toro*, 513 F.2d 656, 664 (2 Cir. 1975), *cert. denied*, 44 U.S.L.W. 3201 (U.S. Oct. 6, 1975). But we noted that the defendants had been advised not only of their constitutional rights but also that each "was a target of the investigation." 513 F.2d at 660.⁴ That was not done here.

It appeared to us that prosecutors in this circuit generally had been following Section 3.6(d) of the ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function (Approved Draft 1971).⁵ Section 3.6(d) provides:

⁴ So, too, in *United States v. Winter*, 348 F.2d 204, 205 (2 Cir.), *cert. denied*, 382 U.S. 955 (1965), also a perjury prosecution, the defendant was advised that he was "a prospective defendant," and we left aside the question whether a potential defendant must be advised of his status since that question was not presented on the facts of the case. 348 F.2d at 208.

⁵ See, e.g., *United States v. Bonacorsa*, slip op. 1451, 1460 (2 Cir. Jan. 9, 1976); *United States v. Del Toro*, *supra*, 513 F.2d at 660; *United States v. Corallo*, 413 F.2d 1306, 1328, 1329 n.6 (2 Cir.), *cert. denied*, 396 U.S. 958 (1969); *United States v. Irwin*, 354 F.2d 192, 199 (2 Cir. 1965), *cert. denied*,

"If the prosecutor believes that a witness is a potential defendant he should not seek to compel his testimony before the grand jury without informing him that he may be charged and that he should seek independent legal advice concerning his rights."

See *United States v. Washington*, 328 A.2d 98, 100 (D.C. App. 1974).

We did not wish simply to assume, however, that all prosecutors in the circuit now adhere to this standard. We accordingly directed the clerk of our court to make written inquiry of the United States Attorneys for each district in the circuit concerning their practice in this regard.

The United States Attorneys have replied with unanimity that where a person called before the Grand Jury is known to be a potential defendant he is warned that he is a "target of the investigation" or a "subject of the investigation." More particularly, the United States Attorney for the Eastern District of New York, where the Grand Jury which heard this defendant sat, replied that "our practice is to advise the potential defendant . . . that he is a target of the investigation."

We thus have a situation in the Eastern District where if Estelle Jacobs had appeared before the Grand Jury on a subpoena issued by the United States Attorney she would have been warned that

383 U.S. 967 (1966) ; *United States v. Winter*, *supra*, 348 F.2d at 205; cf. *United States v. Scully*, 225 F.2d 113, 116 (2 Cir.), *cert. denied*, 350 U.S. 897 (1955).

she was a target, while the Strike Force operating in the same district failed to give her such warning.

In this posture of conflicting conceptions of prosecutorial fairness in the same district, we need not consider whether there is a constitutional due process claim as the court below held. Uniform justice is not achieved in the face of such disparity which, if not in actual violation of the Constitution, is, at least, outside the penumbra of fair play. In *In re Persico*, 522 F.2d 41 (2 Cir. 1975), we upheld the right of Strike Force attorneys to appear before the Grand Jury partly because they were under the supervision of the United States Attorneys. We are sorry to learn that this may not always be the fact. We suggest that Strike Force attorneys should be instructed on and should adhere to the practices of the United States Attorney.*

* Reviewing the guidelines set out in Appendix A to the *Persico* opinion, *supra*, we note that there appears to be an omission with regard to the matter here at issue. It is provided, *inter alia*, that "[t]he Chief of the Strike Force and the United States Attorney . . . shall have the responsibility of keeping each other fully advised of all organized criminal matters in progress." 522 R.2d at 68. "Fully" is perhaps too ambiguous and requires clarification. It is also provided:

"When a specific investigation has progressed to the point where there is to be a presentation for an indictment, the Chief of the Strike Force shall then for this purpose operate under the direction of the United States Attorney who shall oversee the judicial phase of the development of the case."

Id. at 69. What is lacking is a statement that when the investigation has progressed to the point where witnesses are called to testify before the Grand Jury, the Strike Force shall op-

In the interest of uniformity in criminal procedure within the circuit, which is a fundamental of the administration of criminal justice, we affirm the dismissal of Count Two pursuant to our supervisory function.

We do not mean to imply that a potential defendant has a constitutional right not to be called before the Grand Jury at all. See *United States v. Dionisio*, 410 U.S. 1, 10 n.8 (1973); *United States v. Doe*, 457 F.2d 895, 898 (2 Cir. 1972), *cert. denied*, 410 U.S. 941 (1973); *United States v. Winter*, 348 F.2d 204, 207-08 (2 Cir.), *cert. denied*, 382 U.S. 955 (1965). Nor do we deal with perjury committed by a prospective defendant after adequate warning of his status. We are satisfied that we should affirm in this case solely under our supervisory power.⁷

erate under the direction of the United States Attorney. We think this should have been assumed by the Strike Force since, under the guidelines, even preliminaries, such as arrest warrants and search warrants are, where practicable, to be sought with the concurrence of the United States Attorney. *Id.*

⁷ Since the suppression of the Grand Jury testimony wipes out the entire predicate for the perjury count in this case, Judge Neaher also properly dismissed Count Two of the indictment before trial.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of February one thousand nine hundred and seventy-six.

Present: HON. WILFRED FEINBERG

HON. MURRAY I. GURFEIN

HON. ELLSWORTH VAN GRAAFEILAND
Circuit Judges

[Filed Feb. 24, 1976, A. Daniel Fusaro, Clerk]

75-1319

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

ESTELLE JACOBS, a/k/a "Mrs. Kramer",
DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

by /s/ Vincent A. Carlin
VINCENT A. CARLIN
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of April, one thousand nine hundred and seventy-six.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

ESTELLE JACOBS, a/k/a "Mrs. Kramer",
DEFENDANT-APPELLEE

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, United States of America, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is
DENIED.

/s/ Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of April, one thousand nine hundred and seventy-six.

Present: HON. WILFRED FEINBERG
HON. MURRAY I. GURFEIN
HON. ELLSWORTH VAN GRAAFEILAND
Circuit Judges

75-1319

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

ESTELLE JACOBS, a/k/a "Mrs. Kramer",
DEFENDANT-APPELLEE

A petition for a rehearing having been filed herein by counsel for the appellant, United States of America

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74 CR 703

UNITED STATES OF AMERICA

—against—

ESTELLE JACOBS, a/k/a "MRS. KRAMER", DEFENDANT

APPEARANCES:

DAVID G. TRAGER, ESQ.
United States Attorney,
Eastern District of New York
By EDWARD C. WEINER, ESQ.
Special Attorney, United
States Department of Justice

RUBIN, SEIDMAN & DOCHTER, ESQS.
Attorneys for Defendant
By IRVING P. SEIDMAN, ESQ.

MEMORANDUM AND ORDER

NEAHER, District Judge.

The defendant moves to dismiss the indictment on the ground, *inter alia*, that when called before the grand jury to testify, she was not warned that she was a subject of the investigation.

The facts are not in dispute. The defendant is a housewife who was employed at various times in a credit collection agency. She appeared when summoned, without counsel, before a federal grand jury on June 10, 1974 and on November 4, 1974. The government admits that when she was called to testify before the grand jury the defendant was not just another witness, but was in fact a "putative defendant," in that the government had incriminating evidence against her.¹

The warnings given her on each occasion are set forth in the margin.² She was not warned at the

¹ The grand jury transcript of November 4, 1974 (at p. 4) makes it clear that the defendant was a "subject" of the grand jury investigation, and government counsel who conducted the grand jury investigation, Edward C. Weiner, Esq., admitted this in open court and in his brief (at p. 15). Moreover, an internal Department of Justice memorandum, February 15, 1974, disclosed to the court in connection with defendant's argument that Mr. Weiner lacked proper authorization to appear before the grand jury, reveals that the defendant was indeed a target of the grand jury investigation.

² June 10, 1974:

"Q. Mrs. Kramer, I want to explain to you your various Constitutional rights that you have as a witness who appears before a Federal Grand Jury. I want to tell you that this is a Federal Grand Jury inquiring into the possibility of a violation of the Federal Criminal Law, and the first right you have is the right under the Fifth Amendment to refuse to answer any question that you feel might tend to incriminate you; do you understand what your rights are under the Fifth Amendment?

"A. Yes.

"Q. At any time you feel the questions I am asking

may tend to incriminate you, you will not be obliged to answer those questions; do you understand that?

"A. Yes, I do.

* * * * *

"Q. Now, the next right you have under the Sixth Amendment, is the right to counsel; you can have a lawyer of your choice outside of the Grand Jury room to assist you with any questions that you may have a question with . . . you may have an opportunity to leave the Grand Jury room and consult with your attorney, do you understand that right?

"A. Yes, I do.

"Q. Do you have an attorney with you today?

"A. No, I do not.

"Q. Now, do you feel the need of one?

"A. I do not."

Transcript at 2-3.

November 4, 1974:

"Q. I believe you appeared before this Grand Jury on June 10, 1974, is that correct?

"A. That's correct.

"Q. At that time, Mrs. Jacobs, I explained to you your various Constitutional rights.

Do you have any questions now about those rights?

"A. No.

[Government counsel then repeated substantially the Fifth Amendment privilege and right to counsel warnings as above set forth.]

"Q. If at any time you would like to interrupt the proceedings and call an attorney, let me know and you will be given the opportunity.

"A. There is one question as to Mr. Weiner—

"Q. Yes.

"A. I'm here and you are asking me if I feel—I don't know why I'm here, Mr. Weiner, to be very honest with you. You are implying do I feel, do I need an attorney. I have asked you repeatedly why am I here.

[Footnote continued on page 17a]

time of her first appearance that she was the subject of the investigation. Shortly after her second appearance she was indicted for communicating a threat over the telephone, 18 U.S.C. § 875(c), and for perjury before the grand jury, 18 U.S.C. § 1623, when she denied the alleged threatening statements.

Jacobs was therefore in much the same situation as the "putative defendants" in *United States v. Mandujano*, 496 F.2d 1050 (5 Cir. 1974), *cert. granted*, 95 S.Ct. 1422 (1975), and in *United States v. Rangel*, 496 F.2d 1059 (5 Cir. 1974). In those cases, the court, underscoring that the questioning proceeded without full *Miranda* warnings regarding the defendants' rights to remain silent and to appointed counsel, found the questioning concerning criminal activity under the circumstances to be "beyond the pale of permissible prosecutorial conduct," *United States v. Mandujano*, *supra*, 495 F.2d at 1058 (emphasis in original), and a violation of Fifth Amendment Due Process. *Id.* The court reasoned that grand jury questioning by the prosecutor in such circumstances smacks of entrapment and the baiting of the defendant to commit perjury. Since the defendant in each case was not likely to confess

² [Continued]

"Q. You are a subject of this investigation, Mrs. Jacobs.

"A. I told you everything I know, Mr. Weiner.

"Q. I have some additional questions and that's why you're here today."

Transcript at 2-4.

to a crime before the grand jury, “[h]is only ‘safe harbor’ was to remain silent—a right of which the government failed to inform him.” *Id.* at 1055. While a defendant could have asserted his Fifth Amendment privilege against self-incrimination in such circumstances, the court found the warnings advising of such a right to be minimally adequate at best in a situation where questions were asked calculated to elicit answers that were either incriminatory or perjurious. Under such circumstances, the court held that a full Fifth Amendment warning which includes the right to remain silent must be given. *Id.* at 1056-57.

In this case Jacobs, brought before the grand jury the first time without being told she was a subject of the investigation³ or that she had the absolute right to remain silent, was asked specific questions concerning the making of allegedly threatening statements. In framing the questions which are alleged to have resulted in perjury, the prosecutor apparently read from a transcript of the telephone conversation during which the threats were allegedly made. It is now clear that this was possible only because the government had beforehand a tape recording of the conversation allegedly involving the defendant, derived from a phone wiretap. In short, before the defendant made her first appearance before the grand jury, the government prosecutor had undoubt-

³ She was only told this at her second appearance, see n. 2, *supra*, while the basis of the perjury count was her testimony at her first appearance.

edly made his own factual determination, to his satisfaction, that Jacobs was guilty of the crime about which she was questioned and later indicted. And, simply with the possession of the wiretap tape, the government undoubtedly felt it had all but the identity evidence for probable cause to be found by the grand jury that Jacobs violated 18 U.S.C. § 875(c).⁴

Under the circumstances, asking her if she made the statements the government already had recorded, without fair warning of the trap she was being led into is not permissible prosecutorial conduct.⁵ Had the questions served some useful investigatory function, the conclusion might be otherwise. But no suggestion has been made to the court that such a purpose lay behind the question, and the court must agree with defense counsel's assessment that the questions which led to the alleged perjurious responses served *no other function* than to give the government an additional prop on which to base its case against defendant.

⁴ Further, the government's own brief (at 12) admits that the grand jury was presented with sufficient independent identity evidence.

⁵ See *United States v. Washington*, 328 A.2d 98, 100 (D.C. C.A. 1974), which found the failure to advise the defendant that he was a potential defendant contravened Standard 3.6 (d) of the ABA Project on Standards for Criminal Justice, The Prosecution Function. That section provides:

"If the prosecutor believes that a witness is a potential defendant he should not seek to compel his testimony before the grand jury without informing him that he may be charged and that he should seek independent legal advice concerning his rights."

The court therefore sees no reason why the result reached in *Mandujano* should not control here. The *Mandujano* court simply concluded that the prosecutorial conduct involved was "so 'offensive to the common and fundamental ideas of fairness' as to amount to a denial of due process." 496 F.2d at 1059. We have reviewed the authorities cited by the government which are said to suggest a contrary result. None of the cases cited suggests either that no grand jury questioning of a putative defendant can ever amount to a deprivation of due process^o or that due process should not be tested in such cases by an appraisal of *all* the relevant facts and circumstances.

On such an appraisal, the court concludes that the entire grand jury proceeding was a violation of Jacobs' due process rights under the Fifth Amendment. Consequently, all her grand jury testimony

^o See, e.g., *United States v. Corrallo*, 413 F.2d 1306 (2 Cir.), *cert. denied*, 396 U.S. 958 (1969), in which warnings that the defendants were subjects of the investigation were given. *Id.* at 1328 & 1329 n. 6. In *United States v. Winter*, 348 F.2d 204 (2 Cir.), *cert. denied*, 382 U.S. 955 (1965), the court found a much clearer legitimate interest in the defendant's being summoned before the grand jury. *Id.* at 208. In *United States v. Scully*, 225 F.2d 113 (2 Cir.), *cert. denied*, 350 U.S. 897 (1955), it was far from clear that Scully was "marked for prosecution." *Id.* at 114.

The government's other cited authorities are either similarly inapposite or support the conclusion reached here. *E.g.*, *United States v. Luxenberg*, 374 F.2d 241, 246 (6 Cir. 1967), citing *Stanley v. United States*, 245 F.2d 427, 434 (6 Cir. 1957), both cited by the government, states that

"a person who is virtually in the position of a defendant must be accorded the same rights as a defendant."

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must be suppressed and the perjury count, being based solely upon such testimony, must be dismissed.

The defendant's various motions to dismiss are otherwise denied in accordance with the views expressed by the court at oral argument. Discussion of any other outstanding matters is reserved for September 18, 1975, at 10:00 a.m., at which time a prompt date for trial of the indictment will be set.

SO ORDERED.

/s/ Edward A. Neaher
U. S. D. J.

Dated: Brooklyn, New York
July 21, 1975